IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2110 OF 2006
IN
SUIT NO.1810 OF 2006

Shri Raja Dashrath Yadav
& Ors. ..Plaintiffs.

Vs.

Shri Dilip Vimalnand
Koopikar & Ors. ..Defendants.

Mr.Shailesh Shah with Mr.Dilendra Mishra for the Plaintiffs.

Mr.K.Kharawala i/b.M/s.R.K.Associates for Defendant Nos.1 and 2.

Mr.G.Jaju i/b.M/s. A. Bharat & Co. for Defendant Nos.6 and 7.

CORAM : S.J. VAZIFDAR, J.
DATED : 13TH DECEMBER, 2007

P.C. :

. The Plaintiffs have filed this suit after a delay of about twenty five years inter-alia for a declaration that a power of attorney in favour of Defendant No.1 is forged, fabricated and for cancellation thereof and for a declaration that Defendant Nos.1 to 7 are in wrongful use, occupation and possession of the suit property and that Defendant Nos.1 to 5 are not entitled to carry out any construction thereon. They have also sought a

permanent injunction restraining Defendant Nos.1 to 5 from carrying out any construction or from dealing with or disposing of or creating any third party rights in the suit property. Lastly, the Plaintiffs have sought an order directing Defendant No.8, the Bombay Municipal Corporation to revoke the construction/permission granted in favour of the Defendants. The Notice of Motion is taken out for interim reliefs in terms of the aforesaid reliefs.

2(A) It will be noticed at the outset that the plaintiffs have merely sought declarations. Consequential reliefs for possession have not been sought. The suit is thus liable to be dismissed on this ground alone.

(B) After this part of the judgment was dictated, the learned Advocate appearing on behalf of the Plaintiffs stated that the Plaintiffs have taken out Chamber Summons No.502 of 2007 for amendment of the plaint. At no stage during the course of the arguments was this Chamber Summons referred to.

(C) In any event, this by no means is the only ground on which the present Notice of Motion is liable to be dismissed.

4. Apart from the fact that even on merits there is no substance in the Plaintiffs case, it is important to note that the suit is filed after a delay of about twenty five years. The suit is filed after various third party rights have been created over the years. These third party rights have been created to the knowledge of the Plaintiffs. In any event, considering the facts and circumstances, it is evident that the Plaintiffs had and it must be said at the very least, that the Plaintiffs ought to have had knowledge of the same. These third parties have altered their position to their enormous detriment as I shall presently demonstrate.

5. The Plaintiffs allege to have acquired certain rights in the suit property by way of long and uninterrupted user/possession.

By an agreement dated 8th June, 1981 the Plaintiffs sold whatever right, title and/or interest that they may have had in the suit property to Defendant Nos.1 and 2. Defendant No.1 is a promoter of the second Defendant society viz. Ex-Defence Servicemen Co-operative Housing Society

Ltd. On the same day, a power of attorney was executed by the Plaintiffs in favour of Defendant No.1 in respect of the said property.

The Defendant's contention that possession was also handed over to Defendant Nos.1 and 2 appears to be correct. In any event, the Plaintiffs themselves admitted that as of 1995/1996 they have not been in possession of the said property. Admittedly, at least as of 1995/1996 Defendant Nos. 1 and 2 have been in possession thereof.

6. In 1987 the owners of the said property F.E. Dinshaw Trust filed Suit No.528 of 1987 against the Plaintiffs and Defendant Nos.1 and 2 alleging that the Defendants were trespassers and had no right, title and interest therein. In fact, in 1980 the Tahsildar had passed an order collecting N.A. taxes from the Plaintiffs. This order was set aside by the Deputy Collector in an Appeal filed by the Trust on the ground that the Plaintiffs were encroachers.

7. Suit No.528 of 1987 was disposed of in terms of the consent terms dated 20th June, 1990. It may be mentioned at this stage that Defendant Nos.1 and 2 were Defendant Nos.6 and 7 in that suit and the

Plaintiffs herein were Defendant Nos.1 to 5 to that suit. Clauses 1 and 4 of the consent terms read as under :-

> "1. The Defendants have now satisfied the Plaintiffs and accordingly the Plaintiffs agree that the Defendant Nos.1 to 5 and through them the defendant Nos.6 and 7 (i.e. Defendant Nos. 1 and 2 herein) are in settled possession of the land comprising Survey No.267 Hissa No.1/1(pt) Village Malad, CTS No.610 (pt), Malad (E) having five residential structures thereon, and admeasuring about 3,651.27 sq. mtrs. more fully described in the Schedule written hereunder and shown more particularly in the plan attached herewith bounded red."
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> "4. The defendants Nos.1 to 5 have voluntarily paid to the Plaintiffs through Defendant No.6. ex-gratia an amount of Rs.8,74,000/- and not as consideration for the land, the receipt of which the Plaintiffs do hereby acknowledge."
>
> (emphasis supplied)

Admittedly, the said amount of Rs.8,74,000/- was paid by Defendant Nos.1 and 2 and not by the Plaintiffs.

8. It is thus clear that as on the date of the Consent Terms at least i.e. 20th June 1990, it was Defendant Nos.1 and 2 and not the Plaintiffs who

were in possession. The Plaintiffs case that they were illegally dispossessed in 1996 is thus belied and the case of Defendant Nos. 1 and 2 is accordingly corroborated.

9. The Plaintiffs contend that the proceedings and the orders passed in the said suit are non-est and void as Defendant No.1 falsely purported to appear on their behalf under the power of attorney which they contend is forged.

10. Prima-facie at least, it is clear that possession was in fact handed over in 1981 itself by the Plaintiffs to Defendant Nos.1 and 2. This is established inter-alia by the fact that Defendant Nos.1 and 2 corresponded with various statutory authorities as well as private parties. On 21st August, 1990 the DILR identified and demarcated the suit property. This was done on the application of Defendant Nos.1 and 2. The Plaintiffs have not even contended that they had done the same. This is a strong point in favour of Defendant Nos.1 and 2 for if no rights had been created in their favour the Plaintiffs would certainly have at least made some enquiries about the DILR’s visit.

11(A). On 3rd July, 1995 the Bombay Municipal Corporation issued an I.O.D. and on 24th May, 1996 a commencement certificate was also issued.

(B). On 18th December, 1995 Defendant Nos.1 and 2 sold 1000 sq.yards from out of the suit property to Defendant Nos.6 and 7. Defendant Nos.6 and 7 put up their board on the property. The sale was after public notice was issued. I am informed that thereafter the plot was in fact accordingly segregated.

Pursuant thereto, Defendant Nos.6 and 7 obtained an I.O.D. on 3rd May, 2001 and a commencement certificate on 2nd November, 2001. The construction commenced soon thereafter and was completed by the year 2003. A ground plus seven floor structure is admittedly in existence on the said property, purchased by Defendant Nos.6 and 7. All the flats and premises in the said construction have been sold, and third parties are in possession of the said flats and other premises therein. None of these third parties are impleaded in this suit.

12. The above facts establish that the Plaintiffs had surrendered whatever rights they had in 1981 as

contended by the Defendants. It is impossible to believe that the Plaintiffs who allege that they had been illegally dispossessed in 1996 did nothing in the matter for all these years despite being aware of the massive construction activities.

13. Mr.Shah invited me to compare the signature on the power of attorney. The same would not carry the matter further as Mr.Shah was unable to produce any admitted signatures of the Plaintiffs pertaining to the relevant period. To compare signatures after the Plaintiffs raised the dispute would be irrelevant unless it was established to be the normal signature . In any event the surrounding circumstances strongly belie the Plaintiffs case regarding the authenticity of the documents.

14. It was then contended that the Court ought at least to grant reliefs in respect of the balance property.

15. I do not agree. Even as far as the remaining properties are concerned, the Plaintiffs are not entitled to any reliefs. Firstly the aforesaid facts themselves belie the Plaintiffs case.

16. Moreover, in respect of the remaining property, a development agreement had been entered into between Defendant Nos.1 and 2 on the one hand and Defendant Nos.3 to 5 on the other. Defendant Nos.3 to 5 were the developers.

It is not necessary to set out the protracted litigations that had to be adopted by Defendant Nos.1 and 2 to secure their rights upon the said property as against Defendant Nos.3 to 5. It appears that Defendant Nos.3 to 5 have been absconding even in the litigation initiated by Defendant Nos.1 and 2 for securing their rights.

A Contempt Petition is pending against Defendant Nos.3 to 5. The Contempt Petition is taken out by Defendant Nos.1 and 2.

It is only after this litigation between Defendant Nos.1 and 2 commenced against Defendant Nos.3 to 5 that the present Plaintiffs for the first time sought to assert their rights.

17. The buildings on this remaining plot are also

completed. The parties are only awaiting an occupation certificate. During these last twenty five years, the Plaintiffs have done nothing in the matter. And now when the unfortunate members of Defendant No.2 are about to realize the fruits of their efforts to secure their rights this suit is filed.

18. Further, it is important to note that even according to the Plaintiffs, they were allegedly forcibly dispossessed from the property in 1996. It is difficult to accept this story for more than one reason. I am inclined to accept the case of Defendant Nos.1 and 2 that possession had been handed over pursuant to the said agreement in 1981 itself. From 1996 upto 16th November, 2004 the Plaintiffs did absolutely nothing in the matter. On 16th November, 2004 the Plaintiffs allegedly filed a police complaint. Even in this police complaint, there is no allegation that the Plaintiffs had been forcibly dispossessed in 1996. It is pertinent to note that the construction started on this property latest by 2001. Despite the same, the complaint is filed only on 16th November, 2004.

A Criminal Complaint for forgery was filed thereafter in the year 2005. An order dated 9th December, 2005 indicates that the Plaintiffs did not pursue this complaint seriously. Even today, Mr.Shah was unable to give any details regarding what the Plaintiffs have done in respect of the said complaint. Ultimately, this suit was filed on 13th February, 2006 after a delay of twenty five years.

19. I am inclined to accept the submission on behalf of Defendant Nos.1 and 2 that this suit is filed mala-fide in collusion between the Plaintiffs and Defendant Nos.3 to 5. There is no other explanation for the delay.

20. Ultimately, pursuant to detailed consent terms, it was necessary for Defendant Nos. 1 and 2 to invest an amount of about Rs.1 Crore to ensure the completion of the construction and to enable the members of Defendant No.2 after almost two decades to get possession of their flats. The members of Defendant No.2 were compelled to do so to avoid demolition on account of Defendant Nos. 3 to 5 illegally constructing in excess of the permissible FSI and creating further rights on the property.

21. In the circumstances, the Notice of Motion is dismissed.

The costs to be costs in the cause.